BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the District Court of the United States for the District of Columbia (R. 8-10) is not reported, and the opinion of the United States Court of Appeals for the District of Columbia (R. 17-24) is reported in Fowler v. Pilson, *et al.*, 123 F. (2d) 918.

Jurisdiction.

The judgment of the United States Court of Appeals for the District of Columbia was entered on October 13, 1941. (R. 24.) A petition for a rehearing was denied on December 6, 1941. (R. 25.) The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented, Specifications of Errors to be Urged, etc.

A statement of the questions presented, specification of errors to be urged, and a statement of the case will be found in the foregoing petition.

ARGUMENT.

I.

The determination of the case is limited by stipulation to the one question whether "the Judgment * * * is barred by the Statute of Limitations". The Court below erred in not confining itself to this issue and in basing its decision on issues excluded from its consideration. The judgment is not "barred" in California. Petitioner is therefore entitled to recover.

(a) *The stipulation is as follows,—*

"7. That the sole issue to be litigated herein is *whether the judgment* described in the bill of complaint *is barred* by the statute of limitations." (R. 6.)

(b) *No question was before the Court below other than "whether the judgment is barred by the Statute of Limitations."*

"• • • the question considered by the Circuit Court of Appeals was not properly before it and it should have passed upon the merits. • • • *All other questions were taken out of the case by stipulation.*" (Tuker v. Alexander, 275 U. S. 228, 230, 231.)

"Where, in Action of Ejectment, Attorneys Make Stipulation Limiting Issues to Title Then Held by the respective parties, a sheriff's deed to one of the parties, executed after the stipulation was made, is not admissible in evidence, though the deed is given upon a sheriff's sale made before the signing of the stipulation." (Bagley v. Ward, 37 Cal. 121.)

(See also Metro-Goldwyn-Meyer Corp. v. Fear, 104 F. (2d) 892, C. C. A. 9; Phillips v. Patterson, 53 P. (2d) 807 (Cal. App.); U. S. Casualty v. District of Columbia, 107 F. (2d) 652 (App. D. C.).)

(c) *Petitioner was entitled to recover on this single issue: The California authorities hold that a judgment is not barred after five years from its recovery.*

"The judgment in question *was not outlawed.* It is true that *an action upon it was barred, but the bar was only to that particular remedy. The judgment was still enforceable." (In Re* Rebman, 150 Fed. ps. 759, 761, 762. C. C. A. 9.)

"A statute of limitations *bars the remedy,* but does not affect the right." (Powell v. Petch, 136 P. 55, 166 Cal. 329.)

"The statute of limitations is a bar to the remedy only, and does not extinguish, or even impair, the obligation of the debtor." (Puckhaber v. Henry, (152 Cal. 419) 14 Anno. Cases, ps. 844, 846.)

"The judgment" (obtained in 1928 and proceedings started in 1939) "upon which the proceedings are founded," (under §685, Cal. Code), *"was not barred* by the Statute of Limitations • • •." (Pacific Gas • • • Co. v. Elks Duck Club, 103 P. (2) 1030 (Decided June 1940).)

(See also Mason v. Cronise, 20 Cal. 212, Opinion by Judge Field, later a Justice of the United States Supreme Court.)

II.

The Court below erroneously and in conflict with the California decisions held, that this action could not have been brought in California at the time it was brought here: and that petitioner's judgment was incapable then of being otherwise enforced there.

General.

The Court below failed to recognize the spirit of liberality towards the creditor in which the California Courts treat the plea of the statute of limitations. They hold that

"everyone being able should pay his debts. * * * there must, then, be something added to the mere fact of the expiration of time," (which is all there is here), "and that the debtors were possessed of personal property which would move the court to deny the right" (to execution) "given by the statute * * *," (§685). (McClelland v. Shaw, *et al.*, 23 Cal. App. (2) 107; Doehla v. Phillips, 151 Cal. 488, 91 P. 330.)

McGrath v. Butte County, (87 P. (2) 381, Cal. App.), holds that where the question whether the case is within the statute of limitations is doubtful, the court should not indulge in a strained construction in order to support the plea.)

(a) *This action could have been brought in California at the time it was brought here.*

(1) The Court below erroneously held that this is an action upon the California judgment, and that the bringing of it at the time the action was brought here was prohibited by §336 of the California Code (App. *infra*, p. 30) because more than five years had elapsed after its entry; but it is not an action upon the judgment but is an action in equity to set aside a transfer made by the debtor and to impress a lien upon the property transferred.

> "The suit to obtain judgment for payment of a claim in due course of administration is not, as appellant seems to think, an action to establish a new judgment liability, based upon the old; * * *." (Saunders v. Simms, 183 Cal. 167, 170; 190 P. 806.)
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> "The bill maintained by a judgment creditor to subject to the payment of his demand property fraudulently transferred by the debtor is not, strictly speaking, an action upon his judgment. It is really an action for equitable relief against the obstruction caused

by a transfer, which hinders him in satisfying his claim by the ordinary process of law; * * *." (Sewell v. Price, 128 Pac. Rep. 407, 409; 164 Cal. 265.)

"* * * he" (a creditor) "may bring an action in equity to set aside the fraudulent conveyance and subject the property to the satisfaction of his judgment lien in which case the action is not one on the judgment but is an equitable one for relief against the obstruction caused by the fraudulent transfer which hinders him in satisfying his claim by the ordinary process of law; * * *." (Richardson v. Michel, 113 P. (2d) 916, 920, Cal. App.)

"The creditor's suit is not, strictly speaking, an action on the judgment. It is really an action for equitable relief against obstructions to execution." (7 Cal. Jur. §7, p. 796.)

(See also Sefton v. San Diego Trust & Savings Bank, 106 P. (2) 974, 977, Cal. App.; 14 Am. Jur. §44, p. 701.)

(2) The judgment here is not barred. (See authorities under Pt. I above.) The mere lapse of time is the sole ground for the claim that this action could not be maintained in California or brought here, and does not sustain the claim, particularly as it appears affirmatively that the debtor has not been prejudiced by the delay. In fact, there has been no delay. The California Courts have uniformly permitted the enforcement of judgments in actions similar to that here.

Petitioner did not discover that the debtor had transferred the property in question here,—all the property he had,—to his mother until after this action was brought, and was obliged to amend his complaint, making the mother a party and amending the action as one to set aside the conveyance. (R. 3.)

(a) The mere lapse of time, the sole objection here, is not sufficient objection to the maintenance of this action.

> "Admittedly, the judgment, which was for money loaned to the appellant, had never been satisfied in whole or in part, and *no reason whatever appeared* why in equity and good conscience he should not be compelled to pay the same. The failure of plaintiff to earlier enforce the judgment which appellant should and could have any time voluntarily paid, was entirely without prejudice to any of his legal rights, and did not render the granting of the order an abuse of discretion. Under such circumstances it would appear that the exercise of a sound discretion would require the enforcement of the judgment." (Doehla v. Phillips, 151 Cal. 488, 495, 91 P. 330.)

(b) As there is no California statute barring a judgment, when an action is brought to enforce it after five years, the California Courts determine whether it is enforceable on the doctrine of laches and hold that laches do not apply where there is a mere lapse of time, but it must appear that it would be unjust to enforce it on account of some act of the creditor.

> "The doctrine of laches is not designed to punish a plaintiff, and can be invoked only where to allow a claim would, because of claimant's own acts, have permitted an unwarranted injustice." (McClelland v. Shaw, 23 Cal. App. (2) 107, 72 P. (2) 225.)
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> "The defense of laches is different from the statute of limitations in this, that in order to operate a remedy because of laches, there must appear, in addition to mere lapse of time, some circumstances from which the defendant or some other person may be prejudiced, or there must be such lapse of time that it may be reasonably supposed that such prejudice will accrue if the remedy is allowed; * * *." (10 Cal. Jur. §62, p. 523). (See also Doehla v. Phillips, *supra*.)

(c) The following case wherein a creditor was allowed after five years to recover judgment against an estate for

the amount of a previous judgment, and the additional cases cited and described in the opinion, illustrate how far the California Courts go in allowing new actions.

In 1912 the Palace Hotel Company v. Crist, 45 P. (2) 415, 6 C. A. (2) 690, the company recovered judgment against Crist for $2,126.14. Nothing was paid on the judgment. Crist died in 1931. In 1932 plaintiff applied for an order under §685 to enforce the judgment. It was granted. Plaintiff then made a claim against Crist's estate. As it was not acted on, he commenced an action, securing judgment for $5,437.60. Defendant appealed, contending that the cause of action was barred by §336 of the Code of Civil Procedure, providing that an action on the judgment must be commenced within five years, and §408 of the Probate Code forbidding the allowing of a barred claim against an estate.

The Court held,—

> " 'In Faias v. Superior Court, 133 Cal. App. 525, 530, 24 P. (2) 567, 569, construing the effect of Saunders v. Simms, 183 Cal. 167, 190 P. 806, 808, the court used the following language: * * * And when the judgment debtor has died and the statute of limitations has run against the judgment the Court may under this section grant the judgment creditor leave to enforce the judgment by the presentation of a claim against the estate and by the bringing of an action thereon if the claim is rejected.' Under the facts and the law as above cited we are satisfied the complaint herein states a cause of action and is not barred by the statute of limitations above cited." (Palace Hotel Co. v. Crist, 45 P. (2d) 415, 416.)
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> (See also Phillips v. Price, 153 Cal. 146, 94 P. 617.)

(d) The California reports abound in cases where the Courts have ordered enforcement of judgments when more

than five years have passed since their entry. We cite a few of them,—

Title of Case	Place Reported	Judgment Entered	Judgment Enforced	Years of Delay
In Re Rebman	150 F. 759	1897	1904	7
Pacific Gas Co. v. Elks Duck Club	103 P. (2d), 1030	1928	1939	11
Palace Hotel Co. v. Christ	45 P. (2d), 415, 416	1912	1932	20
Bredfield v. Harlan	154 Cal. 497, 91 Pac. 334	1891	1905	14
Darlhla v. Phillips	151 Cal. 488, 91 Pac. 330	1891	1905	14
Harlan v. Harlan	154 Cal. 341, 98 Pac. 32	——	——	10
Demens v. Huene	98 Cal. App. 748, 265 P. 389, 391	1915	1924	9
McClelland v. Shaw, *et al.*	23 Cal. App. (2d) 107	1915	1924	9

The time within which the Court may enforce or carry a judgment into effect is without limitations, (Doehla v. Phillips, 151 Cal. 488, 91 P. 330; 15 Cal. Jur. §257, p. 257).

(3) The Court below erred in holding that before bringing such an action as this in California it would have been necessary to procure an order under §685 of the California Code: The California cases uniformly hold that under such conditions as are present here it not alone is not necessary to issue execution but execution would be enjoined.

> "After the entry of the judgment writ of execution and *fieri facias* was issued and placed in the hands of the Sheriff of the County where Pilson was then residing. The same was duly returned 'Not satisfied' and

showing no property found belonging to Pilson subject to levy."

"On the date of the filing of this action Raymond H. Pilson had no property here or elsewhere except such interest if any as he may have had in the Benjamin F. Pilson Estate, nor has he had any other property since that time." (Fndgs. of fact (1) and (4) R. 8.)

The amended complaint alleged that the defendant, Raymond H. Pilson had no property in the District of Columbia or elsewhere, except such interest as he had in the estate of Benjamin F. Pilson. The defendants did not controvert this in their answer. (R. bot. 3.)

(a) As both defendants denied the debt, relief could not be had by execution, and this action was necessary.

Execution where granted in a case similar to this is enjoined, and the creditor is remitted to his action in equity.

"The debt and insolvency of the defendant, as well as every other material allegation of the bill except that of fraud, are confessed by the answer; and it would be requiring the plaintiffs to do a vain act if they should be compelled to wait their judgment at law and a return of execution, when it is acknowledged that the only effect would be a return of *nulla bona*, and that the property which they have attached in the meantime would have passed into the hands of bona fide purchasers, under color of a judicial sale, and be lost to them forever." (Heyneman v. Dannenberg (6 Cal. 376) 65 Am. Dec. p. 519, 520.)

"Proceedings supplementary to execution do not enable the creditor to reach property or funds of the debtor in the hands of third persons, when the latter deny the liability or claim title to the property, and hence do not afford the creditor an adequate legal remedy. In such a case the creditor *may proceed by creditor's suit* without first pursuing the statutory remedy. 11 *Nor need he first obtain the order pro-*

vided for by the code in such proceedings, 12 authorizing the creditor to sue the person alleged to have property of the debtor or to be indebted to him, where such person claims an interest in the property adverse to the debtor, *or denies the debt.* 13 Suit being in any event necessary, the creditor may proceed by creditor's bill *without first pursuing the statutory proceedings* which could not give him anything more than a right to sue" (7 Cal. Jur. §10, p. 801.)

"(11) Phillips v. Price, 153 Cal. 146, 94 Pac. 617; Rapp v. Whittier, 113 Cal. 429, 45 Pac. 703; Lewis v. Chamberlain, 108 Cal. 525, 41 Pac. 413; Henderson v. D. S. Denehy Merc. Co., 32 Cal. App. Dec. 459, 191 Pac. 558; Union Collection Co. v. Snell, 5 Cal. App. 130, 89 Pac. 859."

"(12) Code Civ. Proc., §720."

"(13) Nordstrom v. Corona City Water Co., 155 Cal. 206, 132 Am. St. Rep. 81, 100 Pac. 242; Phillips v. Price, 153 Cal. 146, 94 Pac. 617." *(Id.)*

A Justice Court judgment was obtained in 1898, and the Justice made an order directing the executors of the deceased debtor to pay the amount of the judgment in Court. The Superior Court granted an injunction restraining enforcement of the order. The creditors then brought an action and recovered. (Phillips v. Price, 153 Cal. 146, 94 Pac. 617, decided in 1908.)

(b) As stated above, execution was issued on this judgment and returned unsatisfied, and there is no case holding that a second execution is required.

III.

The Court below erred,—(1) in failing to give proper effect to an applicable decision of this Court; (2) in deciding a question of general importance and substance relating to the construction and application of §343 of Title 24 of the District Code, a statute within the spirit and purpose of subdivision (c) of Par. 5 of Rule 38 of this Court, and basically relating to the construction and application of section one of Article IV of the Constitution, which has not been but should be settled by this Court.

For which reasons certiorari should be granted.

(1) The Court below failed to give proper effect to an applicable decision of this Court.

(a) This is an action of original or exclusive equity jurisdiction under the decisions of the Courts of California, (Saunders v. Simms, 183 Cal. 167, 170, 190 p. 806; Sewell v. Price, 164 Cal. 265, 128, p. 407; 7 Cal. Jur. §7, p. 796); and of the District of Columbia, (Halliday v. Halliday, 11 F. (2d) 565; 56 App. D. C. 179, 183), and generally (Hagan v. Walker, 14 How. 29, 33, 14 L. Ed. 312, 314, 315; Russell v. Todd, 309 U. S. 280, 289 to 292; 14 Am. Jur. §44, p. 701).

(b) The Court below held that said §343 of the D. C. Code and §336 of the California Code (App. *infra.*, p. 30), applied both to actions at law, and suits in equity, and that this action was barred both in California and here by said §336 in conflict with the decisions of the Courts of the District and of California, and thereby also failed to give proper (or any) effect to the very recent decision of this

Court in Russell v. Todd, 309 U. S. 280, 289, holding that where, as here, equity jurisdiction is exclusive, laches controls. We quote from the case:

> "But where the equity jurisdiction is exclusive and is not exercised in aid or support of a legal right, state statutes of limitations barring actions at law are inapplicable, and in the absence of any state statute barring the equitable remedy in like cases, the federal court is remitted to and applies the doctrine of laches as controlling." (Russell v. Todd, 309 U. S. 280, 289.)

The decisions in California, and in the District and of this Court are uniform that where the mere lapse of time is the sole basis of the defense of limitations, and no prejudice to the debtor has occurred, but it appears on the contrary that he was not prejudiced, (as it does here), the action is not barred by laches. (McClelland v. Shaw, 72 P. (2) 225, 23 Cal. App. (2d) 107; see cases under (a) and (b) of Pt. II above; George v. Ford, 25 App. D. C. 291, aff'd. 203 U. S. 56; Northern Pac. R. Co. v. Boyd, 228 U. S. 482, and cases cited in 21 C. J. p. 233.)

Moreover, it appears that no claim of laches can possibly be made: Petitioner had not discovered the transfer by the debtor to his Mother when he brought this action, and only discovered it later. (R. 3; Richardson v. Michel, 113 P. (2d) 916, Cal. App.; Halstead v. Grinnan, 152 U. S. 412, 417.)

(2) The issue decided here is one of general importance and substance, and relates to the construction and application of a statute within the spirit and purpose of subdivision (c) of Par. 5 of Rule 38 of this Court, and basically relating to the construction and application of §1 of Article 4 of the Constitution.

Statutes similar to said §343 (App. *infra.*, p. 30), as to the effect of foreign judgments are in force in most of the States. (34 C. J. §1577, p. 1109.)

So, whenever an action in equity is brought in a State, and a foreign judgment is accorded recognition as evidence of the indebtedness, (14 Am. Jur. §21, p. 690), —a creditor's action or an action *in rem*,—the question settled by Russell v. Todd *supra*, (that laches and not the statute of limitations controls, despite statutes similar to §343), will arise, and this Court has not determined that question in a case arising under a statute similar to §343 but only generally as to all equity cases.

So long as the question remains undecided by this Court in a case as to the effect of such statutes, decisions at variance with one another, and in conflict with Russell v. Todd, *supra*, may, and undoubtedly will, be reached in different States, while (the question being one of comity under §1 of Article 4 of the Constitution), a decision of this Court will control, and an infinite amount of litigation for all time be saved.

Because the issue here is of such widespread and general importance, and is a substantial issue, it comes within the spirit and purpose if not within the language of said subdivision (c).

> "We granted certiorari, 310 U. S. 618, 84 L. ed. 1392, 60 S. Ct. 979, upon a petition which set up that * * * the court below had erroneously applied the Ohio rule of limitations and of laches, all questions of public importance concerning the interrelation of state and federal courts." (West v. American Teleph. & Teleg. Co., 311 U. S. 223, 236.)

Conclusion.

The Court below, it would seem, failed to envisage the broad general purpose and spirit of the California statutes, (App. *infra.*, pp. 30-31), and decisions as to limitations of the times within which to bring actions: The time, (five years), fixed by statute within which to bring an action upon a judgment is very short in fact and as compared with that in other states, but this is more than offset by the provision of §685 for enforcement after five years, construed by the Courts as having a broad meaning, and as applying to all methods of enforcing all classes of judgments. This all embracing provision is supplemented by having no time limit to its application, and by the decisions of the courts that every man is supposed to pay his debts, and, therefore, mere lapse of time is no defense to collection, and unless in addition it appears that it would be unjust to do so on account of some act of the creditor the Court is required to grant the creditor relief.

This as a whole makes a unique, but a fair, kindly, honest and beneficent system, to the application of which petitioner is entitled under §1 of Article IV of the Constitution, which he was denied by the Court below, which, (admitting that the language of §343 (App. *infra*, p. 30) entitled petitioner to such relief), on theories expounded at much length, (covering practically one-half of the opinion), none harmonizing with the California law, but all in conflict with it, held that that statute must be given a narrow and rigid construction, and that the California law that the statute must be given a broad interpretation, and that the California law that a man must pay his debts despite the mere elapse of time must be overruled.

Such a confessedly narrow construction—unjust also as the California Courts view it—denying petitioner his rights under the Constitution, should not stand not alone because unjust to petitioner, and a denial of his Constitutional rights, but far more because it would be a pernicious precedent in both of said respects, and because it fails to give a California judgment the full faith and credit to which it is entitled, which would breed many like cases of denying Constitutional rights, reaching into the indefinite future.

WHEREFORE, it is respectfully submitted that this petition should be granted.

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